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### **FINDLAW DAILY OPINION SUMMARIES U.S. 1ST CIRCUIT COURT OF APPEALS**

Criminal Law & Procedure, Sentencing

#### **US v. Almonte-Nunez, No. 13-1896**

Imposition of sentence on defendant following a plea agreement is affirmed as to two of the counts, but vacated and an order issued to enter a modified sentence on the third count, a firearm possession charge, where: 1) the sentence on the firearm possession charge exceeds the statutory maximum, but the overall period of immurement will not be affected; 2) leaving intact a sentence that exceeds the mandated limit may sully the public's perception of the fairness of the proceeding; 3) collateral consequences that are difficult to predict may arise as a result of an above-the-maximum sentence, and it would be unfair to place the risk of such harm on defendant when the excessive sentence is easy to correct; and 4) there are no countervailing circumstances.

Criminal Law & Procedure, Sentencing

#### **US v. Fermin, No. 13-1108**

Conviction and sentence of defendant for possession with intent to distribute both marijuana and cocaine is affirmed, where: 1) the motion to suppress was properly denied, as specific and articulable facts justified the detectives' belief that defendant was engaged in criminal activity prior to their permissible stop and search; 2) the evidence was sufficient to support a reasonable jury's finding that defendant had actual knowledge of the contents of the suitcase at-issue; 3) the district court's jury instructions as to expert witness testimony was not plainly erroneous and multiple warnings were sufficient to offset any potential confusion; and 4) the sentence enhancements were not erroneous, and acquitted conduct - here, the firearm charge - can form the basis of a sentence enhancement.

Criminal Law & Procedure, Sentencing

#### **US v. Pizarro, No. 12-1759**

Conviction and sentence of defendant for conspiracy to distribute cocaine and heroin and for possession with intent to distribute cocaine is: 1) affirmed as to the convictions for aggravated drug conspiracy and possession, where the district court erred by failing to instruct the jury on individualized drug quantity, but because the omitted elements were uncontested and supported by overwhelming evidence such that the jury verdict would have been the same absent the errors, the instructional Alleyne errors were harmless; and 2) vacated as to the sentence and remanded for resentencing, where the district court refused to

engage in credibility assessments with respect to drug quantity and refused to consider Pizarro's arguments regarding firearm enhancement.

Civil Procedure, Debt Collection, Property Law & Real Estate

**Foley v. Wells Fargo Bank, N.A., No. 13-2527**

In this case, plaintiff sued defendant for failing to consider him for a mortgage loan modification, which a class action settlement required the bank to do before attempting to foreclose on plaintiff's home. Dismissal of the complaint is: 1) affirmed with respect to plaintiff's statutory causes of action brought under Mass. Gen. Laws ch. 244 sections 35A and 35B, where the causes of action fell short of stating a cognizable claim; and 2) vacated and remanded as to the common law claims for breach of contract and breach of the implied covenant of good faith and fair dealing, where the district court improperly considered evidence outside of the pleadings to resolve defendant's motion to dismiss, warranting a revival of the common law claims.

Ethics & Disciplinary Code

**Ryan v. Astra Tech, Inc., No. 13-2251**

Orders revoking Attorney Ryan's pro hac vice admission and imposing monetary sanctions are affirmed, where Ryan falsified evidence and lied to the court about attempting to interfere with the deposition of his client.